

Virginia

Regulatory Hot Tip 2014 – 4

Professional Insurance Agents Association of Virginia and DC, Inc.

Liability and Workplace Drug Abuse

Consider the scenario, you, as an employer, are served with papers indicating that you are being sued over an employee accident that he had while on a routine office errand. Unfortunately the employee also tested positive for drugs when arrested. Are you really liable? Is there any way to prevent or reduce your company's liability in the future? The subject of this document is to layout the discussion of the pros and cons of drug testing in the workplace.

Besides the potential for liability, alcohol and drug abuse creates significant safety and health hazards and can result in decreased productivity and poor employee morale. It also can lead to additional costs in the form of health care claims, especially short-term disability claims. Common reasons employers implement drug testing are to:

- Deter employees from abusing alcohol and drugs
- Prevent hiring individuals who use illegal drugs
- Identify early and appropriately refer employees who have drug and/or alcohol problems
- Provide a safe workplace for employees

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- Protect the general public and instill consumer confidence that employees are working safely
- Comply with State laws or Federal regulations
- Benefit from Workers' Compensation Premium Discount programs¹

With this in mind, why wouldn't an organization implement a drug free work environment? Primarily, because there are groups and organizations that fight any attempt to limit the right of the American citizen. To quote an article from the American Civil Liberties Union, "Employers have the right to expect workers not to be high or drunk on the job. But they shouldn't have the right to require employees to prove their innocence by taking a drug test. That's not how America should work." This reflects the old adage, "You are innocent until proven guilty." Additional rhetoric against testing requirements includes:

- Testing is not foolproof (false positives)
- Testing is invasive and humiliating
- Cost of testing
- Tests do not measure job impairment
- Testing policies and procedures are intricate and cumbersome.

The Commonwealth of Virginia does not have statutory requirements obligating business to perform employee drug testing. Although many states have passed laws regulating or restricting an employer's right to require drug testing, currently Virginia has not. Virginia legislation does not address drug testing in private employment. This means that employers are free to require or ask employees and applicants to take a drug test, as long as they don't run afoul of other legal protections. Virginia law does require workers' compensation insurance providers to provide a discount to employers who establish a drug-free workplace program. However, the law allows insurers to determine the criteria for such a program but State law doesn't require insurers to mandate drug testing.²

In general terms, a company can be held liable for actions of their employees both under the influence and not. Two legal concepts that come to mind are often referenced from Black's Law Dictionary, Abridged Eighth Edition as:

1. Respondeat superior is a legal doctrine that states that, in many circumstances, an employer is responsible for the actions of employees performed within the course of their employment.
2. Respondeat superior is based on the concept of vicarious liability. In general terms, vicarious liability is "the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between the two persons."

In an employment context, the vicarious liability of an employer is liability that derives from acts employees perform while working on behalf of the employer. The term is often used in personal

¹ <http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>

² <http://www.nolo.com/legal-encyclopedia/workplace-drug-testing-in-virginia.html>

injury cases in which an employee injures another person while on the job. The employer may be responsible to the party harmed, even though the employer was without direct fault.

Under a vicarious liability theory, an employer may be held liable only for an act of the employee that is committed within the “scope of employment.” However, courts in recent years have defined scope of employment quite broadly. For example, even if an employee disobeys the employer’s explicit instructions and, as a result, causes injury, as long as the injury occurred while the employee was working, the employer may be found liable.³

So, the bottom line is that your company can be considered liable if there is employee drug and alcohol use that causes an accident. The question is, “Are you more likely to be sued if there is not a company testing program?” For that, and any case, the circumstances and facts determine the outcome. If you are interested in starting a program, here are some suggested guidelines.

1. Create a Policy – Have a written policy on drug and alcohol use complete with consequences that has been reviewed by your legal team.
2. Screen Potential Employees – Screen every potential employee (management and worker bee) after a conditional offer of employment has been made.
3. Apply the Rules Fairly – The conditions of drug testing should be the same for all levels of employees. For example, if a manager is called for random testing, the manager should not be able to get out of the test for any reason; workload, important meeting, etc.
4. Set and Communicate Drug Testing Plan for the Work Force – the bare minimums of a plan should provide details as to:
 - a. Conditions mandating a drug test (new hire, employee accident),
 - b. Frequency of testing (random or follow-up to previous positive result),
 - c. Substances you are testing for (alcohol, heroin, etc.),
 - d. How legal drug use is handled,
 - e. Detailed appeal process for employees questioning their results,
 - f. Methods of maintaining privacy and confidentiality of test results,
 - g. Outcomes (Suspension, loss of employment, demotion).
5. Comply with any requirements established by your liability insurance carrier.

A complete drug testing plan may save you and your company from possible public embarrassment and financial liability but there is a significant cost in both time and money to properly implement the program. Even with policies and procedures in place, there is no guarantee that your responsibility and liability will be lessened.

³<http://www.shrm.org/TemplatesTools/hrqa/Pages/Canacompanybeheldliableifanemployeeedrunkdrivingwhileonbusinessstravel.aspx>